UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MICHIGAN STATE EMPLOYEES
ASSOCIATION d/b/a AMERICAN FEDERATION
OF STATE COUNTY 5 MI LOC MICHIGAN
STATE EMPS ASSOC, AFL-CIO

Respondent

Cases 07-CA-103202
07-CB-089960

and

BENNY POOLE, An Individual

Charging Party

and

Cases 07-CA-101623
07-CA-101629
07-CA-114358

CENTRAL OFFICE STAFF ASSOCIATION

Charging Union

Scott Preston, of Detroit, MI, for the General Counsel.
Brandon W. Zuk, Esq., Lansing, MI for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Lansing, Michigan, on April 7-10, 2014. Benny Poole, the Charging Party, filed the charge on September 25, 2012,[1] and the General Counsel issued the third amended complaint on December 19, 2013. The complaint alleges that the Respondent, Michigan State Employees Association d/b/a American Federation of State County 5 MI LOC Michigan State Emps Association, AFL-CIO (MSEA), retaliated against Union Steward Benny Poole for his Board activities in violation of Section 8(b)(1)(A) and (a)(4) and (1) of the National Labor Relations Act (the Act),[2] disciplined Nancy Durner in retaliation for her union activities in violation of Section 8(a)(3); removed job

[1] All dates are 2012, unless otherwise indicated.
[2] 29 U.S.C. §§ 151–169.

duties from, suspended, and eventually discharged Katherine Keelean in retaliation for her union and Board activities in violation of Section 8(a)(3); failed and refused to provide information and/or unreasonably delayed in providing information to the charging union in violation of Section 8(a)(1); created an impression of surveillance in questioning Keelean; interrogated Rhonda Westphal about her union activities in violation of Section 8(a)(1); threatened to charge time to the COSA aggregate leave bank; and issued an investigatory questionnaire with an overly broad rule to Keelean in violation of Section 8(a)(1). The MSEA denied the allegations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

MSEA, with an office and place of business in Lansing, Michigan, has been an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, where it annually derives gross revenues in excess of $250,000 and sent funds in excess of $50,000 from its Lansing, Michigan facility directly to points outside of the State of Michigan. MSEA admits, and I find, that it is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it and the charging union are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Parties

MSEA is a labor organization representing employees of the State of Michigan. Its permanent, full-time staff during the relevant periods fluctuated between seven and nine employees. Kenneth Moore, a State employee on administrative leave from the Michigan Department of Corrections, was elected as president of MSEA in July 2010. Tamara Voigt is his confidential assistant. Donna Spenner served as vice president from July 2010 until July 2012. Her successor, Rod Schneider, passed away in March 2013 and was replaced in April 2013 by Dan Matthies. Matthies served as vice president until March 2014.[3] Tim Schutt served as treasurer until July 2012, when he was replaced by Randall Jecks.[4]

As president, Moore supervises all of the bargaining unit employees. Voigt has been Moore's assistant since September 2010 and is the only support staff excluded from the bargaining unit. Clyde Manning was a labor relations coordinator; Rhonda Westphal and Audrey

[3] The parties stipulated that Schneider died on March 22, 2013 and Moore appointed Matthies as MSEA vice president on April 2, 2013. (Tr. 74-77, 711-712.)

[4] MSEA concedes that Moore, Spenner, Matthies, Schutt, and Jecks served as supervisors within the meaning of Sec. 2(13) of the Act, while the following individuals served as agents within the meaning of Sec. 2(13) of the Act: Ron Damuth, Frank Gonzalez, Voigt, Cathy Connolly and Matthies.

Johnson were labor relations specialists; Katherine Keelean (a/k/a Washburn), Mary Grove and Karilyn Wilson were accounting assistants; Nancy Durner was an administrative assistant; Karen Murphy was responsible for communications; and Fidencio Gonzalez was a labor relations specialist and membership representative.[5] Roberto Mosqueda was a past MSEA president, vice president, Region 4 Director and committee chair before retiring in 2002.

MSEA and the Central Office Staff Association (COSA) have had a bargaining relationship for many years. The current collective-bargaining agreement (CBA) runs from October 1, 2011, to September 30, 2013.[6] The following employees of MSEA (the bargaining unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> [A]ll positions whether full-time, part-time or temporary for employees who are employed for more than 30 calendar days with exception of the Assistant to the President.

Additionally, bargaining unit employees "shall, as a condition of continuing employment, maintain membership with [COSA]. Any new employee hired, hereafter, in bargaining unit positions, shall, as condition of employment, become a member of [COSA] on or before the thirty first (31) calendar day of his/her employment."[7]

Manning served as president of COSA from 2002 until he retired in February 2013. Westphal was vice president of COSA from 2009 until she resigned in 2013.[8] Durner was COSA's secretary/treasurer and a bargaining unit member until July 2011. Johnson succeeded her as secretary/treasurer in July 2011.

B. The Bargaining Relationship

After Moore became president in July 2010, the atmosphere changed within the office. The small work environment at MSEA became less congenial. Shortly after becoming president, Moore opined to the other officers comprising the executive council that it was scandalous that staff controlled the organization. He also expressed a lack of confidence in the other officers and would be appointing others with whom to work with, including Gonzalez and Matthies.[9] Moore also announced that he did not want to work with the elected executive board members and

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[5] GC Exh. 2.

[6] GC Exh. 9 at 2.

[7] GC Exh. 9 at 6.

[8] The General Counsel suggested that Manning and Westphal retired because of the hostile atmosphere, but there was insufficient evidence to support that assertion. (Tr. 37-38, 317-318.)

[9] Moore attempted to evade the question when confronted with the minutes reflecting his statement by insisting that they were not approved minutes and were not accurate. After a long, calculated, and evasive answer, he conceded that he "may have made the statement" as to the "scandalous" state of affairs. (Tr. 682-689; GC Exh. 39.) He was evasive as to whether he made the statement about appointing Gonzalez and Matthies by retreating to the notion that the minutes were not approved. (Tr. 690.) Having heard the previous testimony, he was subsequently recalled to testify as to a "corrected" set of the 4-page executive council minutes for the December 21, 2010 meeting. The "corrected" set was a streamlined one-page version of the comprehensive, accurate minutes. (R. Exhs. 42-43; Tr. 799-806.)

wanted them replaced as well.[10] Adding to the volatility, Matthies and Manning also did not get along due to past disagreements over the prosecution of MSEA member grievances when Matthies was a chief steward.[11]

On April 1, 2011, MSEA and COSA began a contentious set of negotiations for a successor contract, but those efforts resulted in the filing of unfair labor practices and the termination of several employees.[12] At the April 28, 2012 meeting of the board of directors, Moore expressed concern that an MSEA member would give information to the NLRB in its investigation of those charges. Moore numbered the documents distributed at that meeting in order to "catch somebody giving information to the NLRB."[13]

On August 23, 2012, MSEA employees and bargaining unit members Murphy and Wilson sent identical scathing letters to Manning and Westphal excoriating COSA for harassing MSEA for "(unnecessary) grievances, hearings, court proceedings, defamation, and unnecessary financial costs associated with office politics, tactics, intimidation and bullying." They also stated that they did not want their dues to be used for such efforts and concluded with the remark "that MSEA belongs to its members, not the staff. It is my opinion that the efforts of the staff and the funds of MSEA should be spent in the best interests of the members of MSEA."[14]

After a 3-week hearing, Administrative Law Judge Keltner Locke adjudicated the 2011 charges by finding that MSEA violated the Act by unlawfully suspending Durner, unlawfully terminating Grove's recall rights, unlawfully placing Johnson on administrative leave and later discharging her, unlawfully refusing to allow Manning to return from medical leave for almost 2 months after he was medically cleared to work without restrictions, refusing to provide COSA with information, unilaterally implementing new work rules and cell phone use changes, removing bargaining unit work and bad-faith bargaining. Judge Locke's decision is pending on exceptions before the Board.

C. Information Requests

Prior to his retirement from State employment in December 2010, Gonzalez frequently attended board meetings as a committee chair. After Manning went on sick leave for a period of time, Gonzalez, a Moore ally, was assigned to briefly fill his position as an MSEA employee. He became a member of COSA for only 30 days.[15]

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[10] Moore's denial that he expressed a desire to destroy COSA was not credible and contrary to the overwhelming credible evidence. (Tr. 629.)

[11] Matthies testified credibly that he and Manning did not get along due to disagreements over the latter's request that Matthies withdraw employee grievances by MSEA members. (Tr. 85-86.)

[12] It is not disputed that the most recent contract negotiations were "not a pleasant bargaining cycle." (Tr. 39-41; GC Exh. 7.)

[13] Moore did not recall making that statement, but conceded making it after the General Counsel played a recording in which he states that was the reason and he admits it. (Tr. 692-693; GC Exh. 40.)

[14] GC Exhs. 3-4.

[15] Gonzalez was fairly credible as to his temporary role in filling in for Manning while he was on medical leave. (Tr. 508-509, 511.)

Gonzalez' appointment was not announced. However, Westphal saw Gonzalez at MSEA's office on a regular basis and became concerned because the CBA requires that any bargaining unit position be posted prior to filling it. She was concerned as to what his title would be, where he fit within the bargaining unit, and his wages and benefits.[16] Accordingly, on January 31, 2013, Westphal requested, in writing, that MSEA confirm the hiring of Gonzalez, the date of hire, his job title and position, whether full time or part time, permanent or temporary, wages and benefits, any vacancy postings for his position, whether any other employees were hired without a vacancy posting, and confirmation that Gonzalez resigned from MSEA. Westphal also requested that MSEA furnish Gonzalez' personnel file and job postings and information about new employees hired about which the charging union had not been informed. MSEA did not provide the requested information. Gonzalez was informed of the request and asked that his personnel information not be provided.[17]

On February 4, Moore replied to each of the first nine items in the information request, but denied the request for Gonzalez' personnel file information.[18] However, he did offer to reconsider any specific items requested from the personnel files if COSA provided legal authority for the requests.[19]

On February 26, Manning followed up on Moore's response by asking for a copy of Gonzalez' "COSA membership/dues authorization form, his position/classification, his date of hire, and his employment type, that is, full-time, permanent, part time, etc."[20] On February 27, Moore replied that the information requested by Manning regarding Gonzalez "has been provided to [Westphal] on February 5th, 2013. Should you need additional copies, please advise."[21] In response to information as to whether the vacant position was posted, Moore listed the response as "N/A."[22] He did not supplement his February 27 response until May 9, 2013, after charges were filed. At that point, Moore provided Gonzalez' personnel records containing his job title and position.[23]

D. The February 27 Gathering of Staff

[16] Art. 31, sec. B of the CBA provides a designated COSA representative access to personnel records of bargaining unit employees. (GC Exh. 9; Tr. 47-48, 50, 317-320.)

[17] There is no dispute that the requested information was relevant. (GC Exh. 5; Tr. 501.)

[18] Moore denied access to Gonzalez' personnel file upon advice from his attorneys and Gonzalez' objection. He also testified that Murphy and Gonzalez, "two members of the COSA unit," directed that their files not be accessed by COSA. (GC Exh. 6; Tr. 51-52, 67-70, 321-322, 702-703.)

[19] GC Exh. 6.

[20] Moore evasively responded by not initially recalling whether he reviewed this follow up request. (GC Exh. 7; Tr. 52-53, 322-323, 703-704.)

[21] Moore could not recall if he made any effort to look for additional information in order to respond to this follow up request and attempted to attribute the delay and insufficiency of his response to other business and Voigt's illness. (GC Exh. 8; Tr. 53, 323, 712-713.)

[22] Moore conceded that COSA had a right to information as to whether a vacancy announcement was posted. (Tr. 699-701.) As to #9, whether any new employees had been hired, the intent of saying N/A was to convey that none had been hired. (Tr. 702.)

[23] Moore provided a long-winded explanation of how he handles information requests and alleged delays in providing the requested information based on Voigt being "in and out frequently" and that he was "doing catch-up." It was a clear deflection from the fact that he supplemented his February 27 response after charges were filed. (GC Exh. 31; Tr. 658-659, 697-699.)

MSEA does not have any policies against casual conversations in the workplace and it was routine for employees to discuss personal and family matters in the office.[24] During the morning of February 27, 2013, Keelean and Westphal were engaged in such discussion and were joined by Durner about 10 minutes later. They closed the door during the conversation, but were easily observable through Westphal's office window. They discussed personal matters for a while before moving on to a Moore's suggestion the previous day about getting retirees involved in Right-to-Work issues, as well in COSA matters. The discussion lasted about 15 to 20 minutes, with COSA-related discussion taking about 5 minutes.[25]

The "gathering of staff" was observed by Gonzalez, who promptly reported it to Moore as soon as the latter arrived to the office. Concerned that COSA bargaining unit members "had free rein or free access" to MSEA's financial information, Moore went directly to Keelean's office and asked if she shared MSEA's financial information during the earlier gathering. Keelean responded that she engaged in conversation with Westphal and Durner about retirees and their ability to vote in COSA elections. Moore responded that he was only interested in ensuring that COSA did not have access to MSEA financial information without permission from him or MSEA's treasurer. Moore reminded Keelean that she was not to divulge MSEA financial information without his permission.[26]

Later that day, Westphal received an email from Voigt stating that she wanted to deduct time from Westphal's COSA leave bank for conducting a COSA meeting in her office earlier that morning.[27] Westphal responded the next morning, saying that they were not conducting a COSA meeting.[28]

Moore knew that Westphal, Durner, and Keelean had not conducted a COSA meeting earlier that morning.[29] Nevertheless, he instructed Voigt to follow up with such an assertion. By email to Westphal a short while later, Voigt expressed her belief that Westphal conducted a COSA meeting in her office the previous day. Westphal responded by asking for more information, reiterated that there was no meeting and expressed a concern that MSEA would have a problem with employees gathering. Moore responded later and said that he said he spoke with someone and was concerned that they discussed COSA business during the gathering as well as MSEA's financial information. Westphal replied that it would be inappropriate to charge

[24] This finding is based on Westphal's and Durner's credible and unrefuted testimony. (Tr. 197, 331-332.)

[25] Westphal, Durner, and Keelean provided credible and consistent testimony regarding the content of their conversation that morning. (Tr. 195-196, 325-326, 353, 375-376.)

[26] Keelean and Moore provided fairly consistent testimony as to this interaction. (Tr. 351-353, 630-631, 715-718.) Based on Moore's overall lack of credibility, however, I do not credit his uncorroborated assertion that Keelean previously disseminated MSEA financial information to other COSA members. (Tr. 634.)

[27] GC Exh. 19.

[28] Westphal conceded, however, that if it had come to Moore's attention about COSA business had been conducted on MSEA time, it would have been appropriate for him to request that she charge such time to the COSA leave bank. (GC Exh. 19 at 3; Tr. 329, 341.)

[29] Moore conceded that Gonzalez did not describe the gathering as "a full union meeting" since there are more than just the three of them in bargaining unit. (Tr. 720.)

the employee leave bank and expressed concern that Moore was merely interested because of her role as a union officer. The leave was never charged.[30]

E. Nancy Durner

The events of February 27 had consequences. Durner, secretary/treasurer of COSA since July 2011, had been involved in the contentious bargaining in 2011.[31] After the staff gathering on February 27, Moore confronted Durner later that day with a copy of Statewide mailing that she did and followed up with an email. It was a Region 6 meeting notice sent on postcards. The agenda was different on one card as opposed to another.[32]

On February 28, Durner was reprimanded in writing for sending out incorrect mailings.[33] The reprimand noted, in part, that she received prior verbal counseling for outgoing mail issues and a written reminder about outgoing mail issues. The reprimand was issued, notwithstanding the fact that her mailings are reviewed by either Voigt or Moore before being sent.[34] Durner was subsequently terminated, but went to arbitration, prevailed, and was reinstated.[35]

F. Katherine Keelean

Moore's concerns about protecting MSEA's financial information did not end with his February 27 admonition to Keelean. On March 5, Moore issued an investigatory questionnaire to Keelean: "This questionnaire shall remain confidential and is not to be discussed outside union representation."[36] Moore was just getting started with respect to Keelean.

Keelean's duties as an accounting assistant included processing longevity bonuses and withholding applicable income taxes. Typically, a W-4 IRS form is generated to reflect changes in federal income tax withholdings. At employees' requests, Keelean has been adjusting withholdings on paychecks ever since she has been doing payroll.[37] Even Moore made such requests from time to time.[38] Keelean made the adjustments for herself and others upon the belief

[30] Moore did not make a final decision on this issue until May 3, 2013. (Tr. 635-636, 721.)

[31] Durner bargained for a new contract on behalf of COSA alongside Manning and Westphal. (Tr. 663.)

[32] Durner was very credible. She conceded the mistake and responsibility for it, but was not sure of the order in which things happened. (Tr. 198-202, 206, 208, 210; GC Exh. 15.)

[33] Moore denied that Durner's role in bargaining was a factor in reprimanding her (Tr. 659-664).

[34] GC Exhs. 16-17.

[35] GC Exh. 18.

[36] Moore's explanation that he failed to review the template used by Voigt for the final version of the questionnaire was not credible. (GC Exh. 20; Tr. 357, 637-639, 723-724.)

[37] Keelean's credible testimony, that no one ever questioned her about this practice, was not refuted. (Tr. 61-62, 370-371-373, 383-384, 386-387.)

[38] Moore submitted W-4 forms to change withholdings on several occasions. (GC Exhs. 42-43; Tr. 731-732.)

that income tax liability would be lower than previously anticipated.[39] Making adjustments to withholding tables without a W-4 form being submitted was a practice that Joe Barrus, as Keelean's predecessor as accounting assistant, did many times since 1988 until he retired in 2008, especially when it came to annual longevity payments. None of his superiors ever spoke to him, much less admonished him, for that practice.[40]

On a separate matter, Jecks, the new treasurer, was raising concerns with Moore about late tax payments that he uncovered.[41] After receiving a bill for "a penalty fee for late filing of a tax return" and payment of payroll taxes he talked to Keelean about the bill in May 2013. She said she forgot but would usually call and get the penalties waived.[42] Rather than have Keelean do that, however, Jecks paid the bill and proceeded to review "everything" that Keelean had done. Jecks even reached out to Schutt, his predecessor, who was unaware of late tax payments during his tenure.[43] Notwithstanding the late quarterly payments, no penalty was owed for underpayment of taxes at the end of 2013.[44] Aside from the late payment penalties for state taxes paid by Schutt, there was no documentary evidence of any fines or penalties paid to any taxing authority at any other time.[45]

In addition to performing her regular duties, Moore required Keelean to train Wilson, an anti-COSA staffer, to perform her functions. It was no surprise, therefore, that in 2013, as MSEA began to migrate from their old payroll system to a new one, Wilson was given sole responsibility for the new system while Keelean continued working with the old payroll system. One June 1, the old payroll system was discontinued and MSEA began using the new payroll system exclusively.[46] During that migration, Jecks continued performing his comprehensive review of Keelean's work, which uncovered the ammunition Moore needed to undermine Keelean: changes to employees' income tax withholdings without any corresponding W-4 forms or other documentation.[47]

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[39] Moore testified that Keelean made a previous withholding adjustment for herself after he denied her request to convert annual leave into sick leave. His opinion as to why Keelean made the change was not credible (Tr. 672-673.), as I fail to see how taking action to reduce one's income tax withholding connects with the denial of a leave request. (Tr. 386-387.)

[40] Barrus's testimony about his unfettered past practice in making tax withholding changes without W-4 forms also went unquestioned. (Tr. 218-222.)

[41] R. Exh. 44.

[42] Keelean and Jecks provided fairly consistent testimony regarding their discussions on the issue of penalties for late payments and her past success in getting them waived. (Tr. 381-382, 788-796.)

[43] Jecks conceded that MSEA had not received a bill from the State, but he initiated the review anyway and calculated the penalty for late payment. (Tr. 767-770; 788-799.)

[44] Keelean's testimony that the undocumented W-4 changes never resulted in underpayment penalties went unrefuted. (Tr. 389-392.)

[45] Moore conceded that there is no such evidence, but purported to rely on "knowledge that the treasurer had reconciled the payroll and . . . reconciled with the federal, the state, and the city; and the city and the state had their filing automatically done interest and penalties. The federal, from what I recall, did not." (Tr. 739.)

[46] Wilson did not testify, but it is undisputed that Moore had her gradually assume all of Keelean's responsibilities. (Tr. 349, 666-667, 747, 771.)

[47] It was during this migration to a new payroll system that Moore and Jecks stepped up their investigation of Keelean's work. Both pored over the payroll records and found several manual overrides

Moore proceeded to conduct an extensive amount of research to determine whether withholdings without documentation created potential liability on the part of MSEA. He also directed Jecks to make sure that MSEA paid any applicable penalties relating to the withholding of payroll taxes.[48]

Moore's plot to have Wilson undermine Keelean came to fruition on July 15, when he handed Keelean a memorandum, dated July 13, prohibiting her from accessing MSEA's financial records and removing her computer access. The memorandum pruned her duties to two of nine tasks listed in her position description. The action was attributed to Wilson's report on July 12 that there were entries in prior payroll records showing adjustments by Keelean to federal, state, and local tax withholdings.[49]

Moore's adverse action came several months after COSA filed the charge in Case 07-CA-101629. That charge referred to Keelean's role in the February 27 staff gathering and the March 5 questionnaire. The allegations then appeared in the complaint and notice of hearing, which issued June 28 for a hearing on July 23.[50]

Moore was not done, however, with Keelean after reducing her duties and computer access. On July 23, he issued another questionnaire to Keelean, which she completed and returned to Moore.[51] On July 24, Moore issued another questionnaire to Keelean, which she completed based on information available to her, and confirmed that she had been requested by employees to adjust their income tax withholdings.[52] Voigt followed up saying she provided an incorrect response.[53] On July 25, Moore issued Keelean yet another questionnaire regarding income tax withholding modifications and she responded, confirming again that she processed modifications upon employees' requests.[54] On July 29, Moore issued Keelean another questionnaire relating to her processing of income tax withholdings and she responded again based on the information available to her.[55]

On August 2, Keelean went on medical leave for severe migraine headaches.[56] At some point after she left, Moore wrote a disciplinary report recommending Keelean's discharge, noting that "even without work rules in place, [Keelean's] actions are grounds for discipline because the

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by Keelean to income tax withholdings without corresponding W-4 forms or other documentation. (Tr. 664-672, 675-676, 772-783; R. Exhs. 36-40.)

[48] Moore was impeached with R. Exh. 21, dated July 12, while GC Exh. 41 is an email dated over 2 months' earlier, April 10, when he did not even have knowledge of Keelean's actions as to withholdings. (Tr. 679-680, 740-743.)

[49] R. Exh. 21 at 1, 63; GC Exh. 21.

[50] Keelean did not testify in the prior case and there is no evidence that MSEA supervisors or agents knew prior to her testimony in this case that she signed a Board affidavit. (Tr. 378-379, 388-389.)

[51] There was no dispute that Keelean had difficulty responding to the questionnaires due to the limitations placed on her access to MSEA records. (GC Exh. 22; Tr. 361-362.)

[52] GC Exh. 23; Tr. 362.

[53] GC Exh. 24.

[54] GC Exh. 25.

[55] GC Exh. 26.

[56] MSEA did not question the legitimacy of Keelean's medical leave. (GC Exh. 28; Tr. 366-367.)

trust of the employer has been irreparably damaged and she was aware that such actions are prohibited."[57] Moore presented the report and recommendation, plus additional records relating to prior discipline, at a specially convened meeting of the executive board (Moore, Matthies, Jecks, and Kafer). The other members of the executive board agreed with Moore's recommendation that Keelean be discharged, but decided to offer her the opportunity to resign.[58]

On August 16, MSEA placed Keelean on emergency disciplinary suspension.[59] On September 20, Moore attempted to contact Keelean, but was unsuccessful. He followed up with a letter, dated September 23, offering her the opportunity to resign in lieu of termination. During this period of time, Keelean was visiting her father in Missouri.[60] On September 24, MSEA discharged Keelean and replaced her with Wilson.[61]

G. Benny Poole

Benny Poole retired as an employee of the Michigan Department of Corrections in 2010, but has been an MSEA member since 1988. While employed, he served in several union capacities, including chief steward from 1989 to December 2012. He also sat as second chair in arbitrations with the COSA membership chair. He has never been employed by MSEA and MSEA no longer represents him regarding his terms and conditions of employment. Even after retiring, however, Poole continued to regularly attend board meetings.[62]

Poole had a relationship with Moore going back as far as 2006. After Moore became MSEA president, he made frequent remarks about getting rid of COSA during the regular and executive sessions of board meetings. Poole voiced his concerns about it during the meetings and eventually went to the Board's Regional Office in Detroit and reported Moore's anti-COSA remarks in December 2011.[63]

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[57] GC Exh. 41.

[58] R. Exh. 21.

[59] GC Exh. 27.

[60] It is not disputed that Moore attempted to contact Keelean and she was outside of Michigan during this period of time. (Tr. 368-370; GC Exhs. 29-30.)

[61] I credit the testimony of Jecks, which was at odds with that of Moore and Kafer (Tr. 531, 679.), that Keelean's activities with the NLRB did indeed come up during the special executive board meeting: "I know it was brought up that she had testified at the other one, but that's all I recall about that. I'm sorry." (Tr. 785.)

[62] Poole's credibility was attacked on cross-examination with respect to his address and whether he lives and has a romantic relationship with Johnson based upon his testimony at the first trial. (Tr. 407-408, 457-460, 472-473, 489-490.) That approach, however, was too tangential to the issues at hand.

[63] Poole and Moore were not very credible witnesses but, where they conflicted, the findings relied on corroborating evidence. Thus, while Poole's assertion as to an anti-COSA statement by Moore in November 2011 was impeached by prior sworn testimony, there is an abundance of credible testimony by others corroborating Poole's testimony as to Moore's frequent remarks about COSA at board meetings. (Tr. 409-411, 414-417, 464-470, 485; R. Exh. 19.)

Poole was in the MSEA office on a bargaining assignment in February 2012 and spoke with Manning and Westphal. Within the next several days, Spenner, Gonzalez, and Schutt each commented to Poole that they heard about his recent visit to the NLRB's Regional Office.[64]

Moore's behavior toward Poole changed at the next MSEA board meeting. Poole was recognized to speak by a member, but Moore interrupted and asserted that Poole was not a member in good standing because he had not paid his union dues. Schutt went to confirm that claim, but found that Poole's dues were up to date.[65]

Poole also attended the April 2012 board of directors meeting and, as customary, was provided with a meeting packet. Unbeknownst to him, however, Moore numbered the packets distributed to nonboard members such as Poole. Poole proceeded to provide the packet to the NLRB Regional Office, which produced it at the August 2012 unfair labor practice hearing before Judge Locke.[66]

On June 8, 2012, Poole attended a special board of directors meeting called by Mosqueda, MSEA's region 4 director, to address several MSEA employee complaints. Poole also advised Jo Slaughter, a discharged Michigan State employee who he represented at the grievance stage, to show up for the meeting. Slaughter had been represented in her January 2012 arbitration proceeding by Manning, but he had been replaced after taking medical leave by a new employee, Joan Bush, who was responsible for filing a post-hearing brief on her behalf. Slaughter was concerned because she was not aware of one being filed by the April 1 due date.[67] She addressed the board with her concerns, but Moore said it was an inappropriate venue to discuss her case or to address Manning's status. Moore said that Bush would continue to write the brief, but would assign Westphal to review it.[68] At some point that day, Matthies overheard Poole maligning Bush's advocacy skills and opining that Westphal should represent her instead.[69]

At some point during the June 8 meeting, Connolly was speaking about the practices of member representatives, including Johnson, when Mosqueda told her to "shut the [expletive deleted] up." The meeting then broke for lunch and everyone got up. Connolly, clearly annoyed by Mosqueda's insult, proceeded to leave the room, but Poole and Michael Walker were standing in front of the door. She told Poole to "open the door, boy." Poole complied, but told her not to ever say that to him again and she left to use the restroom. Not pleased by her remarks and

[64] Poole's testimony on this point was more credible and detailed than that of Gonzalez. (Tr. 417-419, 461-462, 501.) In addition, Schutt's testimony as to whether Moore made remarks about getting rid of COSA was not convincing. (Tr. 524.) He initially testified that there was a lot of labor strife at the time and did not have specific recollection as to what Moore said at the time (Tr. 515.) Spenner did not testify.

[65] I did not, however, credit Poole's speculation that someone locked him out of the room when he stepped out to go to the restroom, causing him to walk around the long way. (Tr. 421-423.)

[66] Poole's testimony on this issue was not refuted. (Tr. 430-431, 435, 761; GC Exh. 40.)

[67] Slaughter's testimony was consistent, responsive, and credible. (Tr. 297-304, 439-440.)

[68] Slaughter testified that she did not witness Poole conduct himself in an unprofessional manner or say that Bush was unqualified. (Tr. 305-308.) On the other hand, she did not corroborate Poole's inconsistent and more dramatic version of her interaction with Moore in which he let her speak for a few minutes but then told her "to get out." (Tr. 440.)

[69] I found Matthies credible on this point. (Tr. 107-108.)

comments about Johnson at the meeting, however, Poole followed Connolly screaming. He told her that she did not know what she was talking about and tried to block her from the restroom and, at one point, raising his fist.[70] Walker left the meeting with Poole, but proceeded to walk upstairs to smoke a cigarette.[71]

Connolly reported the incident to Moore and then submitted a complaint to Eric Waters of the Steward in Training Committee (SITC) on June 11, 2012. At the time, she knew there was going to be a board hearing relating to the COSA charges, but did not know he was going to be a witness.[72] Moore also received a call from Matthies that he witnessed the altercation and was also upset about Poole's criticism of Bush. He indicated that he too filed a complaint with the SITC committee.[73]

Moore was hardly impartial. By June 8, Moore already knew that Poole was cooperating with the Board, so it was no surprise that, when Poole tried to talk to him later that day, Moore told him to stop harassing board members. Moore documented the incident and proceeded to provide his report to Eric Waters, the SITC committee chairman.[74]

Waters proceeded to generate internal union charges and a notice of hearing against Poole on July 9, 2012.[75] The notice of charges and hearing scheduled for October 13 was sent to

[70] I did not credit most of Connolly's version of the incident. Having observed Connolly's brusque tone and indignation during testimony (Tr. 443-445, 474-475, 545-550, 560-563, 569-570), I based this finding on Mosqueda's detailed and consistent testimony. (Tr. 177-178.) Moreover, she lied when she testified that she and Poole were both permitted to speak at the subsequent Board meeting on this issue and that Poole mentioned the alleged slur at that time. (Tr. 556-557, 575.) He was not permitted to speak and no one referred to the slur at that meeting. On the other hand, I do not credit Poole's testimony based on several inconsistencies in his hearing testimony and prior statements. He conceded that, in an affidavit, dated December 3, 2013, in Johnson's lawsuit, he listed numerous past instances of racist comments at MSEA, but failed to mention anything uttered by Connolly on June 8. (Tr. 475-476; R. Exh. 20.)

[71] I credit Matthies testimony that he saw Poole shake his fist at Connolly as she tried to enter the restroom. (Tr. 94-98.) I did not, however, rely on Walker's testimony that Poole was calm after Connolly insulted him. (Tr. 145-148, 159-160.) His testimony was also fraught with inconsistencies, as he failed to mention Connolly's statement at a previous deposition. (Tr. 164-165.) Nor did he mention her statement at Poole's Steward in Training Committee trial. (Tr. 186.) Moreover, he conceded that he could be mixing up the meetings as to when the incident occurred, conceded that Poole was angry and was not sure if he raised his fist at Connolly. (Tr. 187-189.)

[72] While Connolly and Matthies knew about Poole's support for COSA, there is no proof that either of them knew as of June 8 that he would be a witness in the upcoming case. (Tr. 110-111, 550-553, 575; R. Exhs. 34-35.)

[73] Given Matthies own anti-COSA views, there is no reason to believe that he needed Moore to influence his decision to file internal union charges. (R. Exh. 14; Tr. 103-104, 644-646.)

[74] I do not credit Moore's denial that he knew that Poole was cooperating with the Board or going to testify at the upcoming hearing. (Tr. 646-647.) Moore was vague and calculating as to why and how he generated the document and incredibly insisted that he was not aware that the document was going to be provided to the SITC. Moreover, his assertion that Poole never mentioned Connolly's alleged racist remark is of no consequence, since Moore did not give Poole a chance to explain his side of the story. (R. Exh. 4; Tr. 724-727.)

[75] R. Exhs. 8, 14.

Poole at his last known address.[76] Waters also sent Poole notification as to who would participate in the trial body.[77] Efforts to serve the letter on Poole were unsuccessful to his post office box address on file.[78] Moore was also unsuccessful in serving Poole with the charges at the next board meeting, so Voigt contacted the Jackson and Wayne County Sheriff's Departments.[79]

Meanwhile, on August 27, 2012, Poole testified in support of COSA at the previous board hearing.[80] While being cross-examined, MSEA counsel notified Poole of internal union charges pending against him, even though he had not yet been served.[81] During the hearing, while waiting outside the hearing room speaking with another MSEA member, Gonzalez called out to the other person not to speak with Poole because he was not a member in good standing. During another day of the trial, Moore said to Poole, look "super robo chief steward no more."[82]

Poole returned for the resumption of the board hearing on September 24 and was sitting on a bench when Voigt tried to hand him an envelope containing the charges. He asked her what the charges were for and she told him, but he refused to accept the envelope. Poole asked Voigt how she could live with herself; she responded that he was a liar. She added that he should consider the papers served, placed them next to him, said she was serving them on behalf of the SITC committee and started to leave. He followed behind her and said loudly, "[W]hat trial."[83]

Overreacting to her most recent encounter with Poole, Voigt went to a local court and obtained a personal protection order (PPO) against Poole. The PPO, however, was rescinded at a subsequent return date after a judge found that Voigt's allegations did not amount to a reasonable apprehension of harm for a process server.[84]

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[76] Waters was fairly credible as to the basic functioning of the SITC committee. (R. Exh. 5; Tr. 238-239.). In contrast to his testimony about other events, however, Moore's fuzzy recollection about the circumstances leading to Poole's charges and the SITC process was clearly exaggerated and not credible. He testified that he was "not aware of a whole lot" until the SITC's recommendations were reported to the executive council. (Tr. 647.) However, he also testified that Waters came to see him about holding the trial at another location because of the PPO. (Tr. 652-653.)

[77] R. Exhs. 6-7.

[78] Poole's testimony that he went to his post office box and found only mail relating to Voigt's PPO was not credible. (Tr. 446; R. Exhs. 23-29.) Given the presumed regularity of delivery of Postal Service mail, I find that he also received the SITC charges and notice of trial date.

[79] Tr. 237, 582-589, 607-609; R. Exh. 31.

[80] MSEA stipulated that Poole testified against it on August 31. (Tr. 137, 435.)

[81] GC Exh. 33.

[82] I credit Poole's testimony regarding MSEA officer's comments at the hearing location over Moore and Gonzalez. (Tr. 433-435.) MSEA's counsel denied hearing such comments, but I also find that he was not always in a position to hear what Moore said to others as they entered the building and proceeded through the security checkpoint. (Tr. 540-541; 648-649.)

[83] I credit Voigt's testimony regarding her attempts at service over Poole's version. (Tr. 436-438, 597; R. Exh. 5.)

[84] Voigt, obviously caught up in the partisan wrangling involving her supervisor, obtained the PPO on her own. (Tr. 243, 597-598, 600, 614-615; GC Exh. 35; R. Exhs. 8, 30.) Moreover, notwithstanding the workplace flexibility Voigt was given to handle this matter, there is no credible evidence to refute Moore's denial that he directed Voigt to seek a PPO against Poole. (Tr. 650-651.)

Subsequently, Waters called and spoke with Poole and notified him of the October 13 hearing. During that phone conversation, Poole said that he could not attend the trial body because of a personal protective order that was placed on him from Voigt. Waters told him that he was unaware of a PPO being placed on him and said he would look into it and get back to him. After confirming the existence of a PPO, Waters asked Moore to move the trial location to a nearby hotel. Moore agreed. Poole also told Waters that he would not sign for anything. Correspondence to Poole was returned based on "insufficient address" and "unable to forward." An October 9 email to Waters from Poole indicated that he was aware of the scheduled trial.[85]

Waters responded to Poole in an October 11 email.[86] Poole replied in a letter, dated October 15. In it, Poole explained that his attorney advised against attending the October 13 SITC hearing due to Voigt's PPO against him.[87] As a result, the hearing was rescheduled for one week to October 20.[88] Waters had an email sent to Poole to confirm the changed date.[89] Waters assured Poole and his attorney that Voigt would not be anywhere near the trial. He also tracked the email to ensure that Poole received it and knew that Voigt would not be anywhere near the new union trial location. He and others had trouble after that trying to pin Poole down by phone to confirm. Waters left a voice mail message and spoke with his lawyer for reassurance that Voigt would not be at the union trial. The lawyer said he would make sure Poole knew.[90] Poole did not appear for the October 20 trial, nor did he ask anyone to testify on his behalf. He did, however, ask Waters for a witness list, which was provided.[91]

On October 20, 2012, the SITC committee conducted a hearing on the charges filed by Connolly and Matthies and recommended that Poole's MSEA membership be suspended for 2 years.[92] Eric Waters chaired the committee, which heard testimony from Matthies, Connolly and her husband before rendering a decision.[93] Poole was aware of the trial date and time but did not appear.[94] Nor was there any mention at the hearing about Connolly's allegedly incendiary comment to Poole.[95] Waters prepared a report of the trial to the board, dated October 23.[96]

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[85] I found Waters credible, while Poole's testimony and actions during this timeframe indicated a continuing approach to evade service and portray him as ignorant of the processes going on around him. (Tr. 244-247, 251-252, 284, 473; R. Exh. 8.)

[86] R. Exh. 10.

[87] R. Exh. 12.

[88] R. Exh. 13.

[89] R. Exh. 14.

[90] In yet another poor display of credibility, Poole recalled seeing the union trial rescheduling notice prior to the October 20 hearing date. (Tr. 480-481.) I also find it incredible that his attorney would not have notified him of his conversation with Waters. (R. Exh. 13; 15; Tr. 259-263, 480-483, 602.) Moreover, I do not credit Poole's testimony that the attorney told him to stay away from a union trial until after the PPO was resolved in court on November 9. (Tr. 446-448, 479; GC Exh. 35.)

[91] Once again, Poole was not credible. He denied knowing about the October 20 trial date. (Tr. 492.) He also did not recall whether he asked someone to testify on his behalf, but then pondered the question and thought that he did ask Walker to testify on his behalf. (Tr. 483-484.)

[92] R. Exhs. 16-18.

[93] Although no one testified on behalf of Poole, there is no evidence that Waters failed to follow the applicable MSEA constitution and trial procedures in conducting the October 20 hearing. (R. Exhs. 1-2; Tr. 229, 266-267, 554.)

[94] Poole's testimony that he failed to appear based on legal advice was not credible due to my finding that Waters made his attorney aware that Voigt would not be present, which was satisfactory to the

The SITC's membership suspension recommendation was scheduled for consideration and action by MSEA's board of directors at its December 1, 2012 meeting.[97] While Poole did not appear for the October 20 SITC committee hearing, he did appear at the December 1 board of directors meeting.[98] Connolly and Matthies appeared and recounted their versions of the June 8 incidents. Walker was present, but did not address the SITC recommendation.[99] Poole also asked to speak but, before he could be recognized, a board member called the question to a vote. The board proceeded to vote in favor of suspending Poole's MSEA membership for 2 years.[100]

LEGAL ANALYSIS

I. COSA'S INFORMATION REQUEST

Gonzalez, a Moore ally, was assigned to temporarily fill Manning's position while Manning was out on sick leave. His appointment was not announced. In response, Westphal requested that Moore provide COSA with Gonzalez' title and position, date of hire, wages and benefits, and whether he was full time, part time, permanent or temporary, vacancy postings for his position, and confirmation that Gonzalez resigned from MSEA. Westphal also requested Gonzalez' personnel file and job information for any new employees. MSEA did not provide the requested information.

When a request for relevant information is received, an employer's obligation is to provide it or set forth adequate reasons why it is unable to do so. *Kroger Co.,* 226 NLRB 512, 513-514 (1976). The employer also has the obligation to respond in a reasonable period of time. *Bundy Corp.,* 292 NLRB 671, 679 (1989); *DePalma Printing Co.,* 204 NLRB 31, 33 (1973).

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attorney. (Tr. 171-172.) Moreover, Poole did not mention such a concern when he told Walker that he would not attend. (Tr. 156.) I also found it significant that Walker did not seek to testify on Poole's behalf at that hearing. (Tr. 288.)

[95] I found Waters' denial credible that he did not hear anything prior to or at that meeting about Connolly's alleged insult. He did see Walker on the day of the SITC trial and assumed he would testify since he had reason to believe that he had been in the area of the altercation on June 8. However, Walker did not come forward to testify. (Tr. 270-272, 292-293, 295-296.)

[96] R. Exh. 18.

[97] The General Counsel notes that art. XV, sec. 4 of MSEA's constitution required that Poole should have been given 10 days' written notice that the SITC's recommendation would be considered at the board meeting. (R. Exh. 1.)

[98] Poole incredibly insisted that he showed up for the December board meeting without knowing that a suspension recommendation from the SITC committee would be on the agenda. When asked whether he received notification at his registered and last known address at the post office box, he evasively responded that he could not recall. (Tr. 494-495.)

[99] Walker was present and conceded that neither he nor anyone else raised the allegation that Connolly hurled a racial insult at Poole. (Tr. 161, 275.)

[100] The credible testimony of several witnesses established that once the question was called, the motion at hand was voted on. (Tr. 161, 163, 168-169, 449-451, 655.) Having heard my inquiry of others, however, as to whether it was routine for the board to forgo a vote on calling the question and, instead, immediately vote on the motion at issue, Moore testified that a vote was taken first on whether to call the question. I found that testimony contrary to the preponderance of the credible evidence and calculated to strengthen MSEA's claim that a fair hearing was conducted. (Tr. 655-656; GC Exhs. 36-37.)

Whether information is provided in a timely fashion depends on the existing circumstances in each case, but the Board has held that a delay as short as 4 weeks can be unlawful. *Postal Service,* 308 NLRB 54 7, 550 (1992).

The Board balances a union's need for information against any "legitimate and substantial confidentiality interests established by the employer." *Detroit Edison v. NLRB*, 440 U.S. 301, 315, 318-320 (1979). The Board considers three factors in making such a determination: (1) the sensitive nature of the information sought; (2) the minimal burden that a requirement of employee consent would impose on the union; and (3) a lack of evidence that the employer had fabricated concern for employee confidentiality only to frustrate the union in discharge of its responsibilities. Id. at 319. Confidentiality is not a blanket defense where the information is relevant to the union. *New Jersey Bell Telephone Co.*, 289 NLRB 318, 319 (1988).

Even if Gonzalez was not an employee, the charging union still had a right to the requested information since, as the Board has stated, "[i]t is certainly well within the statutory responsibilities of the Unions to scrutinize closely all facets relating to the diversion or preservation of bargaining unit work…." *Associated General Contractors of California,* 242 NLRB 891, 894 (1979), enfd. 633 F.2d 766 (9th Cir. 1980). Moore's initial response to the information request was nonresponsive, as it left out several answers without an explanation for why the information was not provided. COSA was entitled to review Gonzalez' personnel record pursuant to article 31, section B of the collective-bargaining agreement. However, Moore improperly refused to release the record, relying on Gonzalez' request that his personnel file not be provided based on confidentiality.

MSEA relies on *Detroit Edison,* supra, in arguing that the sensitive nature of Gonzalez' personnel file outweighs COSA's interest in obtaining the file. However, *Detroit Edison* is distinguishable. There, the union requested the scores of every employee for a test that all employees were required to take, and the employer had promised its employees that their scores would remain confidential. *Detroit Edison*, 440 U.S. at 318. The employer conditionally agreed to disclose the scores only with employee consent. Id. at 319. The employer had released scores in the past, and as a result lower-scoring employees were mocked and ostracized. Id.

In contrast to the facts in *Detroit Edison*, COSA's interest here is much greater, and the risk to the employees is much smaller. COSA only requested job specific information relating to Gonzalez and the remaining information generally related to the names and hiring dates of new employees, all hardly information impacting on employees' privacy interests. See *Wayne Memorial Hospital Assn.*, 322 NLRB 100, 103 (1996) (employer bears the burden of demonstrating that the requested information is privileged). MSEA claimed confidentiality concerns as to the production of Gonzalez' personnel file, but not his date of hire, job title and description, wages and benefits, duration of employment, or the names and hiring dates of all new employees. As such, MSEA failed to show that the requested information other than the personnel file was privileged. Id.

Moreover, MSEA never disputed the relevance or explained why the file was confidential and simply provided it after charges were filed. Thus, MSEA failed to meet its burden of showing that the requested information was in fact privileged. Id. Under the circumstances, COSA's interest in the relevant file information outweighed Moore's claim of confidentiality.

See *Aerospace Corp.*, 314 NLRB 100, 103 (1994) (holding that the Board must balance the union's need for information against the legitimate confidentiality interest established by the employer). MSEA was obligated to provide the requested information.

The Union's follow up request for more information was also not properly responded to. Manning's request for Gonzalez' COSA membership information, position title, date of hire, and employment type was not a request for confidential information. Moore replied that he had already disclosed that information in the previous response, which was false, and did not supply the requested information until after charges were filed. Here, the initial request was sent on January 3 and not fully responded to until May 9, after charges were filed. The requested information was relevant to the Union duties under the CBA and refusing to supply the information for 3 months, and then only after charges were filed, constituted unreasonable delay. See *Bundy Corp.,* 292 NLRB at 679 (holding that a 2-month delay was unreasonable); *Postal Service,* 354 NLRB 412 (2009) (finding a delay of 30 days to be unreasonable). Under the circumstances, MSEA's failure to bargain in good faith in violation of Section 8(a)(5) and (1) by failing and unreasonably delaying in responding to COSA's request for information relevant to its responsibilities as the representative of bargaining unit employees.

II. SURVEILLANCE OF THE FEBRUARY 27 STAFF GATHERING

On February 27, 2012, Keelean, Westphal, and Durner engaged in a casual conversation for about 20 minutes in Westphal's office. All three were easily observable through Westphal's office window. They discussed their pets for a while, and then diverted to Moore's suggestion the previous day about getting retirees involved in Right-to-Work and COSA matters. Out of the 20 minutes, they discussed the COSA-related matters for about 5 minutes. Gonzalez saw the gathering and reported it to Moore. Moore then questioned Keelean as to whether she divulged MSEA's financial information in the gathering. Keelean explained what transpired but denied any discussion about MSEA's financial information. Voigt, Moore's secretary, emailed Westphal later in the day stating that she wanted to deduct time from the COSA leave bank for conducting a COSA meeting during work hours on MSEA's premises.

In determining whether an employer engaged in surveillance of union members, the Board examines whether under all the circumstances, the questioning would reasonably tend to interfere with, restrain, or coerce the employees in the exercise of his or her Section 7 rights. *Air Management Services, Inc*., 352 NLRB 1280, 1286 (2008); *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Rossmore House*, 269 NLRB 1176, 1177 (1984); *Medcare Associates, Inc*., 330 NLRB 935, 940 (2000). Specifically, the Board considers (1) the background of union activity and animus; (2) the nature of the information sought; (3) the identity of the questioner; (4) whether the questioner provides the employee with a valid purpose for the interrogation; and (5) whether the employee was assured that no reprisals would be taken as a result of the questioning. *T-West Sales & Service, Inc*., 346 NLRB 118, 127 (2005); *Performance Friction Corp*., 335 NLRB 1117, 1126 (2001).

Routine observation of employees engaged in open Section 7 activity on company property is not unlawful surveillance. *Aladdin Gaming, LLC*, 345 NLRB 585, 585-586 (2005) (citation omitted). "Out of the ordinary" observation is coercive. Id. at 586. If employee knows or should know the employer can overhear them, and where the employer has a right to be

present, it is not surveillance. *Blue Bell, Inc.*, 186 NLRB 712, 722 (1970). Indicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation. *Aladdin Gaming*, 345 NLRB at 586; *Sands Hotel & Casino,* 306 NLRB 172 (1992), enfd. sub nom. mem. *S.J.P.R., Inc. v. NLRB*, 993 F.2d 913 (D.C. Cir. 1993).

Moore was determined to go after COSA and its members, and after the meeting took place he retaliated against Durner by reprimanding her work. Moore also threatened to charge the informal gathering to the COSA leave bank, alleging that the gathering was a formal COSA meeting. This was a normal gathering of employees to simply chat, but Moore used it as an excuse to continue going after COSA. He interrogated Keelean about what they discussed and expressed concern as to whether Keelean disclosed any MSEA financial information. He also interrogated Westphal after finishing with Keelean.

Under *T-West Sales*, weighing these factors indicates that the surveillance and interrogation was coercive. 346 NLRB at 127. There was no credible evidence that Keelean ever disclosed MSEA's financial information in the past. As such, there was legitimate reason for Moore to suspect that she had and then to inquire whether she disclosed it in that meeting with such exacting scrutiny. Therefore, given Moore's anti-COSA inclination, the lack of a valid purpose for the interrogation, Moore's failure to assure Keelean that there would not be any reprisals, and Moore's reprimand of Durner after the meeting, the surveillance was coercive.

Under *Air Management Services*, the questioning and retaliatory actions by Moore would reasonably tend to interfere with COSA members exercising their Section 7 rights. 352 NLRB at 1286. This constitutes surveillance, and discourages COSA members from meeting under any circumstances, whether COSA-related or not, because such meetings could be reported to Moore and he could reasonably be expected to retaliate. While there is no direct evidence that Durner, Keelean, or Westphal in fact saw anyone observing the gathering, it is not necessary for them to have suspected surveillance at the time for the observation to in fact be surveillance. See *Hialeah Hospital,* 343 NLRB 391, 394 (2004) (employer's installation of a hidden surveillance camera without the targeted employee's knowledge constituted surveillance).

MSEA correctly notes that Gonzalez' observation of the meeting and reporting it to Moore was not coercive surveillance in and of itself; it took place on MSEA's premises and Gonzalez had a right to be outside Westphal's office. There was no evidence that the duration of the observation and Gonzalez' distance from the gathering were inappropriate. On the other hand, although MSEA correctly notes that the gathering took place in an area where it was reasonable to assume that MSEA directors could see them, the surveillance was still coercive because Moore and MSEA engaged in other coercive behavior during and after the observation.

MSEA relies on *Aladdin Gaming* in arguing that it was not surveillance as the gathering took place on MSEA's premises. It also relies on *Blue Bell* in arguing that the observation was "routine" and therefore not coercive. However, Moore's extensive follow up after the meeting far exceeds "routine observation." Moreover, because Moore's actions after the observation were so out of the ordinary, indeed some amounted to labor violations in their own right, under *Aladdin Gaming* the observation was coercive surveillance. It is also not disputed that MSEA employees regularly have personal conversations on work time, and since this was not a union

meeting but just a regular conversation, MSEA's further reliance on *Blue Bell* that it is lawful for an employer to discipline employees doing union activity during work hours when they should be working is inapplicable.

Under the circumstances, Moore and MSEA violated Secton 8(a)(1) of the Act by implying that they engaged in surveillance of the February 27 gathering of bargaining unit members as they exercised their Section 7 rights.

III. INTERROGATION OF WESTPHAL

Gonzalez reported the February 27, 2012 gathering of Westphal, Durner, and Keelean to Moore. Voigt, Moore's personal secretary, then sent Westphal an email stating that she wanted to deduct time from the COSA leave bank for conducting a COSA meeting in her office. Westphal replied the next day that she had not conducted a COSA meeting. Moore directed Voigt to follow up by email to Westphal asserting that she conducted a COSA meeting in her office. Westphal responded by asking for more information and reiterated that there was no meeting. Moore responded by stating that he spoke with someone and was concerned that she was asking about MSEA's financial information.

The Board looks to whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with the rights guaranteed by the Act. *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528 (2007). Where a legitimate basis exists for a management official's inquiry of an employee such an inquiry is not considered an unlawful interrogation. *Tribune Co.,* 279 NLRB 977 (1986).

Voigt acted as Moore's agent in interrogating Westphal about the gathering of staff on February 27. See *Guild Industries Mfg. Corp.*, 133 NLRB 1719, 1727 (1961) (interrogation imputed to employer where it instructed employee to question other employees). Moore had already questioned Keelean about the gathering, and by that point knew it was not a COSA meeting. He instructed Voigt to question Westphal anyway and then questioned Westphal himself. Westphal was involved in the prior bargaining for a new contract for COSA, so Moore knew of her COSA affiliation. This questioning interfered with Westphal's Section 7 rights, and therefore violated Section 8(a)(1).

MSEA relies on *Bridgestone* in arguing that Moore's concern about MSEA's financial information should serve as a legitimate basis for investigating the gathering of staff. However, Voigt's first email to Westphal did not ask whether MSEA's financial information had been discussed at the meeting. Instead, it only contained a statement that the meeting would be charged to the COSA leave bank. Voigt's second email also failed to mention any concern about disclosure of MSEA financial information; it simply asserted that the gathering amounted to a COSA meeting. MSEA's financial information was not mentioned until the third interaction, when Moore emailed Westphal to suggest that either Durner or Keelean disclosed MSEA's financial information. The alleged concern over such disclosure was a pretext to insulate Moore's true intentions in questioning Westphal and spurred by his desire to harass COSA members.

IV. MOORE'S THREAT TO CHARGE THE COSA LEAVE BANK

Following the February 27 gathering, later that afternoon Voigt emailed Westphal stating that she wanted to deduct time from the COSA leave bank for conducting a COSA meeting in her office. Westphal responded that they did not conduct a COSA meeting. At Moore's behest, Voigt responded with another email asserting that the meeting had in fact been a COSA meeting. Westphal responded by asking for more information and reiterating that it was not a COSA meeting. She also expressed a concern that MSEA would have a problem with employees gathering, since there was no company policy against nonwork discussions during worktime, and in fact such conversations occur frequently. Moore then emailed Westphal that he spoke to someone else who said MSEA's financial information was discussed, and instructing her not to misuse worktime. Westphal responded that it would be inappropriate to charge the COSA leave bank. The leave bank was not charged after a further exchange with Westphal indicated that it was not a structured meeting, but Moore did not make this final determination until May 3, 2013.

The "'test' of interference, restraint, and coercion for whether a remark constitutes a threat under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed, but whether the employer engaged in conduct, which it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *Joy Recovery Techology Corp.*, 320 NLRB 356, 365 (1995); *Miami Systems Corp*., 320 NLRB 71 fn. 4 (1995). The Board examines the totality of the circumstances in making this determination. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994). The Act allows supervisors to enforce workplace policies that uphold productivity and discipline within the workplace. *Blue Bell*, *Inc.,* 186 NLRB 712, 721 (1970).

As MSEA does not have any policies against casual conversations in the workplace, and it is routine for employees to discuss personal and family members in the office, MSEA cannot claim that charging this gathering to the COSA leave bank falls under enforcement of a policy to maintain productivity and discipline in the workplace. As in *Joy Recovery*, supra, Moore interrogated several COSA members and engaged in retaliatory actions for their alleged union activities. By threatening to deduct time from the COSA leave bank, Moore restrained COSA's members from engaging in protected activities by harassing them for any perceived union activity. Moore's threat to deduct the "meeting" from the COSA leave bank would reasonably threaten to interfere with the employees' Section 7 rights, as he was specifically targeting informal gatherings of COSA members.

MSEA relies solely on *Blue Bell,* supra, to argue that the employer may lawfully limit union activity during work hours in order to enforce workplace policies regarding productivity and discipline within the workplace. However, this case is distinguishable because there was no actual union meeting, and MSEA had no rules in place restricting casual conversations at the office. This threat was targeted solely at a gathering of COSA members in an attempt to keep them from meeting with one another.

Under the circumstances, Moore's threat to charge the COSA leave bank for the February 27 staff gathering violated Section 8(a)(1) by interfering with the exercise of employees' Section 7 rights.

V. REPRIMAND OF DURNER

Following the February 27 gathering, Moore confronted Durner later that day with an error she had made on a Statewide mailing. Normally, either Voigt or Moore would check over Durner's work before sending out mailings. Nevertheless, Moore reprimanded her the following day for sending out incorrect mailings. Durner was involved in the contentious bargaining between COSA and MSEA in 2011. Moore denied that her involvement in the prior bargaining was a factor in reprimanding her. Durner was terminated, but was reinstated after prevailing during arbitration.

It is unlawful for an employer to take action based on actual or perceived union activity. *Internet Stevensville,* 350 NLRB 1349, 1356 fn. 19 (2007). For adverse employment actions first the General Counsel must show that the action was due to an antiunion motivation, and then the employer must show that its business justification is not pretextual. *Wright Line,* 251 NLRB 1083, 1089 (1980). Inferences that actions are taken for discriminatory reasons are warranted under all the circumstances of a case, even in the absence of direct evidence, if there is suspicious timing. *Electronic Data Systems Corp.,* 305 NLRB 219, 219 (1991), enf. in rel part 985 F. 2d 801, 805 (5th Cir. 1993). Simply stating that the company's claimed reason is pretextual is not sufficient; evidence indicating invidious purpose is required. *Neptune Water Meter Co. v. NLRB*, 551 F.2d 568, 569 (4th Cir. 1977). Union activity cannot insulate a worker from being discharged for just cause. Id.

The timing of the reprimand is suspicious, as it took place the day after the staff gathering, while Moore was also engaged in labor violations against the other participants. *Electronic Data*, 305 NLRB at 219. Moore was aware of Durner's COSA-affiliation from the prior bargaining. Credible witnesses have testified that Moore intended to go after COSA members, such as remarks overheard by Poole when Moore first became MSEA president. Also, the combined evidence of the actions he took to that end, specifically interrogating Westphal, threatening to charge the COSA leave bank, interrogating Keelean, removing work from Keelean, and terminating Keelean, further reveal antiunion motivation. Therefore, the General Counsel carried its burden of showing that antiunion animus was Moore's primary motivation in reprimanding Durner. *Wright Line*, 251 NLRB at 1085 (holding that the Board uses a "primary motivation" test, requiring the General Counsel to show that antiunion motivations were the primary reason behind the adverse employment action).

MSEA failed to carry its burden to demonstrate that Moore's justification for the reprimand and termination of Durner was not pretextual. MSEA contends that the reprimand and termination were motivated by Durner's poor work performance, as she allowed a Statewide mailing to go out with errors in it. MSEA also points to previous errors that Durner made and suggests that, taken as a whole, this background supports a proper motive for discipline.

MSEA relies almost entirely on *Neptune Water* to argue that evidence of invidious purpose beyond a bare declaration that Moore's claimed justification is pretextual is required. Here, the evidence of suspicious timing for Durner's reprimand and the evidence of Moore's general attack on and animus towards COSA shows invidious purpose. *Electronic Data*, 305 NLRB at 219. In the past, Moore had only given verbal reprimands to Durner for clerical errors, and when questioned why he issued a written reprimand for this particular error he only stated that it was the next step in the progressive discipline. However, a full week passed from when

the mailings were issued to when she received the reprimand. Based on such suspicious timing, Moore's claimed justification was pretextual and, therefore, the reprimand violated Section 8(a)(3) and (1) by retaliating against Durner for her COSA activities.

VI. KATHERINE KEELEAN

A. Questionnaires Sent to Keelean

When Gonzalez reported the February 27 gathering of staff to Moore, that same day Moore questioned Keelean in person whether she discussed MSEA's financial information during the gathering. She told Moore what had been discussed, and then stated that she did not mention MSEA's financial information. Moore reminded Keelean not to disclose MSEA financials without his permission. Moore then sent an investigatory questionnaire to Keelean on March 5, which contained a provision that she keep the questionnaire confidential and not discuss it outside union representation.

"To justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights." *Banner Estrella Medical Center,* 358 NLRB No. 93 (2012). Communication among coworkers about an ongoing investigation is important in helping them understand what their colleagues face, and what to do if they are also under investigation. *Verizon Wireless*, 349 NLRB 640, 658 (2007).

The questionnaires sent to Keelean concerning the February 27 meeting and changes she made to employees' tax withholdings all contained an overly broad prohibition that Keelean was not to discuss the questionnaire outside union representation and keep it confidential. This prohibited Keelean from discussing an ongoing investigation into her work with her coworkers, which is improper under *Verizon Wireless*. Id.

Moore did not provide a business justification for the confidentiality requirement. Instead, MSEA premised its defense to the overbroad term on Moore's failure to review the template used by Voigt for the questionnaire's final version. However, Moore's claim that this was mere clerical error was not credible.

Under the circumstances, the nondisclosure clause in each of the questionnaires that Moore required Keelean to answer violated Section 8(a)(1) by restraining her Section 7 rights.

B. Removal of Work from Keelean

Moore required Keelean to train Wilson, an anti-COSA staffer, to perform her functions. In 2013, as MSEA began to migrate from their old payroll system to a new one, Wilson was given responsibility for the new system while Keelean continued working with the old system, which was later discontinued. It is not disputed that Moore had Wilson gradually assume all of

Keelean's responsibilities. Moore then issued a memorandum to Keelean on July 15, dated July 13, prohibiting her from accessing MSEA's financial records and removing her computer access. This limited her work to two of the nine tasks listed in her position description in the collective-bargaining agreement.

An employer violates its duty to bargain under 8(a)(1) and (5) when it unilaterally implements changes while a collective-bargaining agreement is in effect. *NLRB v. Katz*, 369 U.S. 736, 737 (1962). Section 8(d) requires employee consent before making midterm modifications to a collective-bargaining agreement. *Oak Cliff-Gloman Baking Co.*, 207 NLRB 1063, 1063 (1973), enfd. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975).

The collective-bargaining agreement listed nine duties for Keelean's position, but seven of these duties were removed from her. They were transferred to Wilson, an anti-COSA staffer whom Moore required Keelean to train. This removal of work constituted a change to the terms and conditions of Keelean's employment while the collective-bargaining agreement was still in effect, and therefore is a violation of 8(a)(3) and (1). *Katz*, 369 U.S. at 737. The change was unilateral, and Moore never gave COSA or Keelean an opportunity to discuss the changes to her work, even though the collective-bargaining agreement had not yet expired and, therefore, Keelean's job duties were a permissive, not a mandatory, subject of bargaining.

MSEA contends that Keelean was locked out of the system as a preliminary step to protect MSEA's financial information as it investigated Keelean's manipulations to the payroll system. MSEA claims that the memorandum was issued when MSEA first became aware of the changes Keelean made to the payroll. However, Keelean had been making changing employee tax withholdings since she started doing payroll, and Jecks informed Moore of the alterations in May. Moore waited until the Company switched entirely to the new payroll system in June before locking Keelean out of the system, rather than lock her out as soon as he knew of her actions. If Moore truly was acting in defense of MSEA rather than going after Keelean for her COSA affiliation, he would have locked her out as soon as he learned of the alterations she made to the payroll. However, Moore himself even requested alterations to his withholdings in the past, so he clearly did not have any issue with the practice prior to July 15. MSEA has failed to show that this was truly a protective measure. Cf. *Texas Gas Corp.*, 136 NLRB 355, 369 (1962) (employer's 5-day strike notice was a protective measure to safeguard against a sudden strike that would significantly affect the employer, rather than motivated by antiunion animus).

Under the circumstances, Moore's removal of seven of the Keelean's nine responsibilities without her consent or that of COSA constituted midterm modifications to an existing collective-bargaining agreement in violation of Section 8(a)(5) and (1).

C. Keelean's Suspension and Termination

Moore wrote a disciplinary report recommending Keelean's discharge, stating that "even without work rules in place, [Keelean's] actions are grounds for discipline because the trust of the employer has been irreparably damaged and she was aware that such actions are prohibited." Moore presented the report to a specially convened meeting of the executive board. They agreed with Moore's recommendation to discharge Keelean, but decided to offer her the opportunity to resign. Keelean was placed on emergency disciplinary suspension. She was offered the

opportunity to resign via letter, but did not respond as she was out of Michigan at the time. Keelean was discharged and replaced by Wilson.

For discriminatory termination cases, first the General Counsel must show that the termination was due to an antiunion motivation, and then the employer must show that its business justification is not pretextual. *Wright Line*, 251 NLRB at 1089.

The General Counsel has carried its burden of showing that Keelean's suspension and termination were primarily motivated by her COSA affiliation and activities. Moore conducted an extensive investigation into how she handled tax withholdings in an attempt to create a legitimate reason for her discharge. However, given that her predecessor altered employees' tax withholdings in the same manner without complaint, and that Keelean made these alterations for years also without complaint, this justification is purely pretextual. MSEA never had to pay any fines or penalties due to her modification of the tax withholding, and Moore himself even requested that she alter his withholdings in the past.

In attempting to rebut the General Counsel's evidence of discrimination, MSEA insists that Moore had a legitimate business justification in terminating Keelean. Relying on *NLRB v. Ogle Protection Service,* 183 NLRB 682 (1970), MSEA contends that, so long as the discharge is not for union activities, an employer has the right to discharge an employee for any reason. It stresses that Keelean's alterations to tax withholdings were improper and exposed the Company to liability. However, Moore himself asked for the alterations to his own tax withholdings in the past and, thus, knew that this was an ongoing process. Keelean's predecessor also made such alterations, with no ramifications. Given the longevity of this custom and practice and the fact that MSEA was never fined for under-withholding at some point, it is evident that adverse action by MSEA would not have flowed her way in the absence of any involvement with COSA. Moore had full knowledge of Keelean's COSA affiliation, and even before she had to train Wilson or news of the alterations to the tax withholding was "discovered," Moore interrogated Keelean about the gathering of staff. Moore simply kept looking until he could find a plausible charge, but ultimately his justification that Keelean improperly handled the payroll system is pretextual, because she did not in fact mishandle it. Therefore, Keelean's discharge was a retaliatory act by Moore in violation of 8(a)(3) and (1).

VII. INTERNAL UNION CHARGES AGAINST POOLE

A. Jurisdiction

Poole was never an employee of MSEA, but has been a member of MSEA for many years. He is a retired employee of the State of Michigan. While an active State employee, he was in one of the bargaining units represented by MSEA. Once retired, he retained his MSEA membership, which is permitted under MSEA's bylaws and constitution.

The Board has jurisdiction over Poole's charges against Moore and MSEA. Section 8(b)(1)(A) applies, as Poole was a MSEA union member, but not a MSEA employee. Section 8(b)(1)(A) prohibits unions, in this case MSEA, from restraining or coercing employees in the exercise of their Section 7 rights. In this context, "employees" does not mean employees of the labor organization, but of the employer the labor organization normally works with. Retaliatory

motives by a union are sufficient to establish that the union's action would reasonably tend to restrain or coerce an employee from filing charges with the Board. *Letter Carriers Branch 47 (Postal Service)*, 330 NLRB 667 (2000). The Board does not bar intraunion discipline under Section 8(b)(1)(A) if it "concerns a purely intraunion dispute, and does not interfere with the employee-employer relationship, or contravene a policy of the National Labor Relations Act." *Office Employees Local 251 (Sandi National Laboratories),* 331 NLRB 1417 (2000).

This is not a standard case of intraunion discipline. This involves a dispute between two unions, as MSEA and COSA had been at loggerheads, and Poole was targeted for his COSA affiliation. Also, the supposed "intraunion discipline" otherwise contravenes a policy of the National Labor Relations Act because of its retaliatory nature. The Act prohibits retaliatory action in response to protected activity. In addition, since "employees" under Section 8(b)(1)(A) does not refer to employees of the labor organization, and union members normally sue the union under this provision regardless of employment status, Poole did not need to be an employee to fall under this provision. See *Carpenters Local 370 (Eastern Contractors Assn.),* 332 NLRB 174 (2000) (finding jurisdiction under 8(b)(1)(A) where union member filed charges against the union for discrimination regarding job referrals). Therefore, the Board has jurisdiction over these charges.

MSEA argues that because 8(b)(1)(A) refers to action by a labor organization, and MSEA is not a labor organization, the Board does not have jurisdiction over this charge. However, MSEA has been an organization in which employees participate and which exists for a purpose, in whole or in part, of dealing with employers concerning labor disputes, wages, or other terms and conditions of employment. It annually derives gross revenues in excess of $250,000 and sent funds in excess of $50,000 from its Lansing, Michigan facility to points outside the State of Michigan. Therefore, MSEA is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and MSEA is a labor organization under Section 2(5) of the Act. Since MSEA is in fact a labor organization, jurisdiction under Section 8(b)(1)(A) is proper.

B. Retaliation

After Moore became MSEA president, he voiced frequent remarks about getting rid of COSA during the regular and executive sessions of board meetings, which Poole regularly attended both before and after his retirement in 2010. Poole expressed concern over these remarks during the meetings, and went to the Board's Regional Office in Detroit and reported Moore's anti-COSA remarks in December 2011. MSEA members later found out about that visit. Subsequently, during the June 8, 2012 board meeting or shortly thereafter, Moore criticized MSEA's decision to assign Bush to write Slaughter's hearing brief, which Matthies heard. When the meeting broke for lunch, Connolly told Poole, an older African American male, to "open the door, boy." Poole followed Connolly screaming, and told her she did not know what she was talking about. He blocked her from going to the restroom, and at one point raised his fist. Matthies caught part of the altercation and filed internal union charges for maligning Bush's skills. Poole testified against MSEA at the Board hearing, and Moore made an insulting remark to Poole at one point during the trial. During the trial, Voigt served Poole with notice of internal union charges against him. They got into a verbal argument, and Voigt filed for and received a Personal Protection Order against Poole as a result of the argument. Poole evaded service of notice of the internal union trial dates, and did not appear even though he effectively received

notice of the location and time, and that Voigt would not be present. Poole later challenged the PPO in court and it was struck down. The hearing recommended suspension, and at the following board meeting the board upheld the recommendation, and denied Poole an opportunity to speak even though a board member was willing to give him time to speak.

The General Counsel must show by a preponderance of the evidence (1) that the employee was engaged in protected activity; (2) that the employer was aware of the activity; and (3) that the activity was a substantial or motivating reason for the employer's action. *Wright Line*, 251 NLRB at 1089. This includes proof that the employer's reasons for the adverse personnel action were pretextual. *Rood Trucking Co.,* 342 NLRB 895, 897-898 (2004), citing *Laro Maintenance Corp. v. NLRB,* 56 F.3d 224,229 (D.C. Cir. 1995). MSEA must then demonstrate by a preponderance of the evidence that it would have taken the same action even in the absence of union or protected concerted activities**.** *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 395 (1983); *Wright Line*, 251 NLRB at fn. 11*; T & J Trucking Co.,* 316 NLRB 771, 771 (1995), enfd. 86 F .3d 1146 (1st Cir. 1996); *Peter Vitale Co.,* 310 NLRB 865, 871 (1995).

Poole's termination was primarily motivated by his membership in COSA, and his testimony against MSEA in the prior hearing. The General Counsel has carried its burden under *Wright Line* to show that the internal union charges were motivated by Poole's protected activities. Poole was engaged in protected activity, as shown by his testimony at the prior trial against MSEA. Moore had full knowledge of this participation since he was also present at the trial, and even made a negative remark to Poole at the courthouse. In February 2012, Spenner, Gonzalez, and Schutt each commented to Poole that they heard about his visit to the Board's Regional Office, and since Gonzalez is an ally of Moore he was most likely informed Moore of Poole's action. Moore was going after COSA and its members, and Poole testified to that effect at the prior trial. Since Poole testified on behalf COSA at the prior trial, the General Counsel carried its burden to show that the internal union charges and ensuing suspension were motivated by Poole's COSA affiliation and his testimony at the prior hearing.

MSEA has failed to show its burden under *Wright Line* that its business justifications for suspending Poole's MSEA membership were not pretextual. *Transportation Management,* 462 U.S. at 395. It argues that the internal union charges were handled properly, and that MSEA was justified in suspending his membership for his altercation with Connolly and for maligning Bush's work. MSEA has not shown that absent the anti-union motivation, charges against Poole would still have been filed and his membership would still have been suspended. Id.

Poole was charged with violating Art. XV Sec. (e) of the MSEA Constitution for misfeasance, malfeasance, and nonfeasance of duties as a steward for maligning Bush's work skills and the Connolly incident. However, that provision does not mention personal misconduct or unprofessionalism as grounds for charges.[101] Poole could only be charged if he failed to carry out his duties as an MSEA steward, but MSEA never argued that. The charges themselves allege that his conduct interfered with Moore and Connolly's ability to carry out their own obligations. However, the MSEA constitution requires that the interference must be deliberate, and must hamper the MSEA official's discharge of his or her lawful union duties. Connolly was on her way to the bathroom when the altercation occurred and nothing further occurred between them,

[101] R. Exh. 3 at 1.

so it is ludicrous to suggest that Poole prevented her from discharging her union duties. Similarly, Poole's criticism of MSEA's assignment of Bush to file a post-hearing brief on Slaughter's behalf did nothing to impede Bush.

While Poole did in fact receive notice, the board of directors' meeting considering the SITC suspension recommendation wreaked of unfairness. Even though he was present and a member sought to cede time to him, MSEA's board of directors heard from Matthies, Connoly and her husband, who was not even present at the time of Pooles's altercation with his wife. As such, the process and the charges were not legitimate in suspending Poole's membership. It is quite clear that if Poole had not been involved in COSA and testified against MSEA in the prior hearing, Moore would not have sought to suspend his MSEA membership. Therefore, MSEA violated Sections 8(b)(1)(A) and 8(a)(4) for retaliating Poole for his support for COSA and testimony against MSEA at the prior hearing.

CONCLUSIONS OF LAW

1. By asking employees questions about their conversations on February 27, 2013, MSEA created an impression among its employees that their union activities were under surveillance in violation of Section 8(a)(1) of the Act.

2. By interrogating employees on February 27, 2013, about their union activities, MSEA violated Section 8(a)(1) of the Act.

3. By issuing an investigatory questionnaire to an employee on March 5, 2013 and prohibited her from discussing it outside union representation, MSEA promulgated an overly broad rule in violation of Section 8(a)(1) of the Act.

4. By threatening to charge employees with time to the COSA leave bank on March 7, 2013, MSEA violated Section 8(a)(1) of the Act.

5. By (1) removing job duties from Katherine Keelean on July 15, 2013, without bargaining with COSA or seeking its consent, and (2) failing to furnish personnel information for new hires and related-job posting information requested by COSA, MSEA has been failing and refusing to bargain collectively and in good faith with COSA as the exclusive collective-bargaining representative of the unit in violation of Section 8(a)(5) and (1) of the Act.

6. By initiating internal union charges and procedures against Benny Poole on June 8 and 11, 2012, and then suspending his MSEA union membership for 2 years on December 1, 2012, because he engaged in protected concerted activity on behalf of COSA, cooperated in a Board investigation, and subsequently testified at a Board hearing in Case 07-CA-053541, et al., MSEA violated Section 8(b)(1)(A) and 8(a)(4) of the Act.

7. By reprimanding Nancy Durner, on February 28, 2013 because she engaged in protected concerted activity on behalf of COSA, MSEA violated Section 8(a)(3) and (1) of the Act.

8. By suspending Kathleen Keelean on August 16, 2013 and discharging her on September 24, 2013 because she engaged in protected concerted activity and testified in the previous Board proceeding, MSEA violated Section 8(a)(3), (4) and (1).

9. The aforementioned unfair labor practices of MSEA affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that MSEA has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

MSEA, having discriminatorily discharged Keelean, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

MSEA shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. MSEA shall also compensate Keelean for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[102]

ORDER

The Respondent, Michigan State Employees Association d/b/a American Federation of State County 5 MI LOC Michigan State Emps Assoc., AFL-CIO (MSEA), Lansing, Michigan, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Creating the impression that employees conversations about their union activities are under surveillance, interrogating employees about their union activities, issuing investigatory questionnaires to employees that contain overly broad confidential rules, and threatening to charge employees with time to the COSA leave bank for engaging in casual conversation about the union.

[102] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Failing and refusing to bargain collectively and in good faith with COSA as the exclusive collective-bargaining representative of bargaining unit employees by (1) removing job duties from bargaining unit employees without first bargaining with COSA or seeking its consent, and (2) failing to furnish personnel information for new hires and related-job posting information requested by COSA.

(c) Reprimanding, suspending, discharging or otherwise disciplining employees for engaging in protected concerted activity on behalf of COSA or cooperating with the National Labor Relations Board.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(e) Initiating internal union charges, suspending or otherwise disciplining MSEA members because they engaged in protected concerted activity, cooperate in a Board investigation or testify at a Board hearing.

(f) In any like or related manner restraining or coercing union members in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind and/or dismiss with prejudice the internal union charges filed against Benny Poole and remove all references to the charges from his member file, and notify the Charging Party in writing that it has done so.

(b) Reinstate Benny Poole's MSEA membership and make him whole for any loss of any benefits he suffered as a result of the unlawful discrimination against him.

(c) Rescind the written reprimand issued to Nancy Durner and remove all references to the reprimand in MSEA's personnel and employment records, and notify her in writing that it has done so.

(d) Offer Kathleen Keelean immediate and full reinstatement to her former position of employment with the job duties she had prior to July 15, 2013, or, if the position is no longer available to a substantially equivalent position, without prejudice to her seniority or other rights or privileges previously enjoyed.

(e) Make her whole for any loss of earnings or other benefits she suffered as a result of the discrimination against her by payment of backpay, and reimburse her for any out-of-pocket expenses she incurred while searching for work as a result of the discrimination against her, with interest in accordance with Board policy.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records

and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Lansing, Michigan, copies of the attached notice marked "Appendix."[103] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 27, 2013.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 23, 2014

_____
Michael A. Rosas
Administrative Law Judge

[103] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT reprimand, suspend, discharge or otherwise discriminate against any of you for supporting Central Office Staff Association (COSA) or any other union.

WE WILL NOT reprimand, suspend, discharge or otherwise discriminate against any of you for cooperating with or testifying before the National Labor Relations Board.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT place your union activities or protected concerted activities under surveillance.

WE WILL NOT issue investigatory questionnaires to employees that contain overly broad confidential rules.

WE WILL NOT threaten to charge you with to the COSA leave bank for engaging in engaging in casual conversation about the Union during worktime.

WE WILL NOT refuse to provide information requested by COSA that is relevant to its duties as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> [A]ll positions whether full-time, part-time or temporary for employees who are employed for more than 30 calendar days with exception of the Assistant to the President.

WE WILL NOT refuse to bargain in good faith with COSA as the exclusive collective-bargaining representative of the aforementioned collective-bargaining unit by removing job duties from bargaining unit employees without first bargaining with COSA or seeking its consent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Kathleen Keelean full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Kathleen Keelean whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Kathleen Keelean for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension and discharge of Kathleen Keelean and reprimand of Nancy Durner, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the aforementioned discipline will not be used against them in any way.

MICHIGAN STATE EMPLOYEES ASSOCIATION d/b/a AMERICAN FEDERATION OF STATE COUNTY 5 MI LOC MICHIGAN STATE EMPS ASSOC, AFL-CIO

(Employer and Labor Organization)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Room 300, Detroit, MI 48226-2543

(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-103202 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.